when he sells the land. However, he may get damages from the purchaser for his loss in damages.

In theory specific performance may be ordered against either party. In practice it is rarely done because of the difficulty of performance. The learned judge did not ask himself whether compensation in money was adequate or not. If adequate, then he should not grant specific performance. Also, he did not consider whether the purchaser was in a position to pay.

The same points were raised in the lower court. The defendant stated that the defence rested on two grounds, namely, adequate remedy and hardship. On hardship, the case of *Patel & Anor* v *Ali & Anor*[3] was referred to. So also *Johnson & Anor* v *Agnew*[4] and *Nicholas* v *Ingram*.[5] Basically, the defence is saying that financial hardship has resulted in their not being able to complete the purchase.

The learned judge found difficulty in reconciling some of the case law on the subject. He was much influenced by the New Zealand case of *Nicholas* v *Ingram*[5] which held that a purchaser's inability to raise the purchase money is not a ground for refusing specific performance. He was aware that the appellant could not raise the money to meet the balance of the purchase price. The fact that the appellant had to borrow money to pay a large part of the purchase price is not a factor to influence his decision.

When the matter came before the learned judge for further argument it was pointed out by the defendant that 'the principles which apply to an application under O 81 r 1 are the same as those which govern application under O 14.' After hearing further arguments from both parties he had no reason to change his view. In fact, he confirmed the decision he made earlier in chambers. The appellant had been given possession of the land and he had demolished the buildings thereon even before he had paid the purchase price in full.

We agree with the learned judge when he said that the hardship had been brought by the appellant himself when he decided to embark on this expensive venture without having secured adequate finance. We see no reason to interfere with the exercise of the discretion by the learned judge. He has exercised his discretion judicially and properly.

For reasons given we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

*Appeal dismissed.*

Solicitors: *AK Lee & Co*; *Shook Lin & Bok*.

Reported by *Prof Ahmad Ibrahim*

## Public Prosecutor v Leonard Glenn Francis

HIGH COURT (PENANG) – CRIMINAL APPEAL NO 51-52-87
EDGAR JOSEPH JR J
1 MARCH 1989

*Criminal Procedure – Sentencing – Plea of guilty to offence of unlawful possession of firearms under s 8 of Firearms (Increased Penalties) Act 1971 – Order of binding over under s 294 of Criminal Procedure Code made by trial judge – Mandatory sentence of whipping not imposed – Whether trial judge in error – Firearms (Increased Penalties) Act 1971, s 8 – Criminal Procedure Code (FMS Cap 6), s 294*

*Criminal Procedure – Sentencing – $5,000 fine for offence of unlawful possession of ammunition – Whether sentence manifestly inadequate – Omission to take public interest into account – Arms Act 1960, s 8*

The respondent pleaded guilty to the charges of (a) unlawful possession of firearms, an offence punishable under s 8 of the Firearms (Increased Penalties) Act 1971; and (b) unlawful possession of 14 rounds of ammunition, an offence punishable under s 8(a) of the Arms Act 1960. With respect to the first charge, the learned president ordered the respondent to be bound over in the sum of $10,000 with two sureties for five years under s 294 of the Criminal Procedure Code (FMS Cap 6). On the second charge, the learned president fined him $5,000, in default one year's imprisonment. The public prosecutor appealed to the High Court against the sentences imposed, contending that they were manifestly inadequate.

In her grounds of decision, the learned president considered that there were grounds to bind the respondent over under s 294 of the Criminal Procedure Code as to the first charge and this made it unnecessary to impose a sentence of whipping which otherwise would have been mandatory under s 8 of the Firearms (Increased Penalties) Act 1971.

**Held,** allowing the public prosecutor's appeal on both charges:

(1) The learned president was clearly in error. Once a conviction is recorded in respect of an offence under s 8 of the Firearms (Increased Penalties) Act 1971, the provisions of s 294 of the Criminal Procedure Code are overridden and the court must proceed to impose a sentence of imprisonment and whipping with not less than six strokes. The sentence in respect of the first charge cannot be justified either in law or on principle. The order binding over the respondent under s 294 of the Criminal Procedure Code is quashed.

(2) Though the consultant psychiatrist had recommended in his report that the respondent be spared corporal punishment for health reasons, his report was an unsworn statement which was not tested by cross-examination though admittedly the prosecution did not contest the contents thereof. However, the medical officer who is required to examine and certify that the respondent is in a fit state of health to undergo whipping will be provided with copies of the report which he will no doubt take into consideration.

(3) As far as the second charge was concerned, the learned president herself had conceded that she had made the mistake of dealing with each charge in isolation and in her anxiety to avoid having to make an order for whipping she failed to consider that a sentence of imprisonment may have been appropriate in order to reflect the serious nature of the offence and to serve as a deterrent to potential offenders. The learned

president had omitted to take into account the public interest. There had been a misdirection by way of non-direction, sufficient in my view to vitiate the sentence of fine imposed. The order imposing a fine is quashed.

(4) In cases which involve the unlawful possession of firearms and ammunition, a prison sentence is virtually inevitable save possibly in altogether exceptional and extreme circumstances. Accordingly, the fact that the accused may be a youth, a first offender and has pleaded guilty, whilst relevant in considering the sentence to be imposed, must perforce yield to the public interest in ensuring deterrence and prevention.

(5) After having given anxious consideration to the age, character, antecedents and family background of the respondent and the circumstances of the case as a whole, in respect of the first charge, a sentence of 18 months' imprisonment is substituted and the mandatory order of whipping of six strokes is imposed. In respect of the second charge, a sentence of 18 months' imprisonment is substituted. The sentences are to run concurrently as the offences were, in the court's view, committed in the course of a single transaction.

**Cases referred to**
1 *R* v *Ball* 35 Cr App R 164 (folld)
2 *Abu Bakar bin Alif* v *R* [1953] MLJ 19 (folld)

**Legislation referred to**
Arms Act 1960 ss 3(1), 8
Criminal Procedure Code (FMS Cap 6) ss 290(1), 294
Firearms (Increased Penalties) Act 1971 s 8

*Bazain bin Idris* (Deputy Public Prosecutor) for the Public Prosecutor.

*CV Prabhakaran* (*SM Ganapathy* with him) for the respondent.

*Cur Adv Vult*

**Edgar Joseph Jr J:** This was a sentence appeal by the Public Prosecutor. In the sessions court at Georgetown, the respondent (having been in police custody for 74 days) was prosecuted and pleaded guilty to the following charges:

*First charge*
That you on 15 January 1986 at about 4.05 pm at house No 18 Halaman Free School, in the district of Georgetown, in the State of Penang, did unlawfully have in your possession firearms, to wit, 2.28 special Smith & Wesson revolvers No 73194 and No C193646, and that you have thereby committed an offence punishable under section 8 of the Firearms (Increased Penalties) Act 1971.

*Second charge*
That you on 15 January 1986 at about 4.05 pm at house No 18 Halaman Free School, in the district of Georgetown, in the State of Penang, did have in your possession 14 rounds of .38 special bullets, in contravention of the provisions of section 3(1) of the Arms Act 1960 without a licence or permit issued under section 4 of the same Act, and that you have thereby committed an office punishable under section 8(a) of the Arms Act, Act No 206 Laws of Malaysia 1960.

The learned president having heard pleas in mitigation and aggravation by the prosecution and the defence proceeded to sentence the respondent as follows:

*On the first charge*
Bound over to be of good behaviour in the sum of $10,000 with two sureties for five years under s 294 of the Criminal Procedure Code.

*On the second charge*
Fined $5,000 in default one year's imprisonment.

*On the third charge*
Fined $800 in default six months' imprisonment.

The public prosecutor being dissatisfied with the sentences as manifestly inadequate appealed against those imposed in respect of the first and second charges only. The maximum penalties which could be imposed in respect of the offences charged in the first and second counts must be noted. So far as the first count is concerned, by s 8 of the Firearms (Increased Penalties) Act 1971, it is provided that:

> Any person who is in unlawful possession of a firearm shall be punished with imprisonment for a term which may extend to fourteen years and with whipping with not less than six strokes.

So far as the second count is concerned, by s 8 of the Arms Act 1960, it is provided that:

> Any person who in contravention of the provisions of this Act-
>
> (a) has in his possession, custody or control, or carries or uses any arm or ammunition without an arms licence or arms permit in that behalf or otherwise than as authorized by the licence or permit or, in the case of ammunition, in quantities in excess of those so authorized; or
>
> shall, on conviction, be liable in respect of any such contravention to imprisonment for a term not exceeding seven years, or to a fine not exceeding ten thousand ringgit, or to both.

In the event, the learned president imposed the sentences aforesaid.

The admitted facts were that as a result of a police report made at the Jelutong Police Station, the respondent was arrested on 15 January 1986 at 1.30 pm. Following interrogation, he led the police party to his house at 18, Halaman Sekolah Free School, Georgetown, Penang. Upon a search being conducted of the respondent's bedroom, the police recovered two .38 Smith Wesson Special revolvers, the subject matter of the first charge, and 14 rounds of ammunition, the subject matter of the second charge. Later the same day, the respondent again led the police party to his house and they recovered from an almeriah in his bedroom, a bullet-proof vest, the subject matter of the third charge. Police investigations disclosed that the respondent held no licence to possess the revolvers, the ammunition or the bullet-proof vest. The result of an examination of the revolvers and the ammunition by the police armourer disclosed that they were serviceable.

I shall now proceed to examine the judgment of the learned president. Firstly, the learned president referred to counsel's plea in mitigation as follows:

> In mitigation, learned defence counsel stated that the accused came from an unhappy family with a philandering father and a mother who had left the family home with his brother and sister, leaving him with the bizarre task of keeping an eye on his father to ensure that he did not bring other women home.
>
> The mother testified that she took part of the blame as she had used him for her selfish interests. According to the plea in mitigation the family was a wealthy one and the accused was very well provided for materially. He attended an expensive private school, but after he left school he opened a public house frequented by undesirable characters to whom he was exposed. He ended up in debt. As for the pistols and ammunition, they were kept in his house by one Tan Yok Khuan. The accused was coerced into allowing him to keep the offending exhibits there as he was afraid Tan and his gang would harm him otherwise.
>
> The defence also produced a medical report (exh D11) by Dr Varughese Thomas, the consultant psychiatrist at the General Hospital, Penang. This report was based on a series of clinical interviews with the accused and his parents. I will not go into the details of the reports except to say that it is the opinion of Dr Thomas that the accused was in need of prolonged psychiatric help by way of psychotherapy and counselling. He was suffering from a blood disorder. His obesity was also to be regarded as a serious physical disorder. For the reasons stated in his report, it was recommended that the accused be spared corporal punishment.
>
> There was also a letter from the Superior of the Little Sisters of the Poor Home For the Aged to certify that the accused was a frequent visitor to the Home and had given 'moral and financial help'.

Secondly, the learned president proceeded to an analysis of the circumstances of the case, and why she considered that there were grounds to bind the respondent over under s 294 of the Criminal Procedure Code in so far as the first charge was concerned and thus, so she thought, make it unneccessary to impose a sentence of whipping which otherwise would have been mandatory. She did so in the following terms:

> The main mitigating factor was the plea of guilt. It is settled law that a plea of guilt is a mitigating factor and is a sign of remorse. Instead of wasting the court's time and public expense by going through a trial and putting up a fictitious defence the accused admitted his guilt at the first opportunity. He preferred to take his punishment rather than take the chance of perhaps obtaining an acquittal on a technicality. If it is rare for an accused to be bound over on a charge like this, it is equally rare for an accused to plead guilty to such a charge without any time wasting.
>
> I also considered the fact that the accused had a clean record and that he was just over 21 years. The consultant psychiatrist had recommended that he be spared corporal punishment for the reasons referred to in the report. His mother had testified that she was willing to look after him and would take him to England for further studies. The accused had also put himself and his family through public humiliation. The charge was one of possession of firearms and was not an offence involving violence. Although the prosecution was ready to supply the court with statistics on armed robberies, I did not think this was relevant as the evidence before the court did not show that the firearms were used by the accused for such a purpose. The learned defence counsel invited the court to take three other robbery offences into account. I did not do so as there was no consent from the prosecution as required by s 171A of the Criminal Procedure Code.
>
> To my mind there were sufficient mitigating circumstances to warrant that the accused be exempted from whipping. Because of the constraints imposed by the section, I could not impose a sentence of imprisonment without imposing whipping. Under those circumstances and after much difficulty I decided to bind over the accused under s 294 of the Criminal Procedure Code. A conviction was recorded against him and if he breaches the bond within the term of five years, he would be brought to court and dealt with for this offence.

Thirdly, the learned president proceeded to deal with the second charge and in the process acknowledged that she had overlooked a material consideration. What she said was this:

> As for the second charge, there was a clear discretion given to the court either to impose imprisonment or a fine or both. I concede that I should not have dealt with each charge in isolation as I did but should have considered his possession of ammunition in the light of the other circumstances, primarily his possession of firearms at the same time. It was the first charge that posed a difficult problem in regard to sentencing and in my anxiety to impose the most appropriate sentence, I failed to consider that a sentence of imprisonment may have been appropriate on the second charge in order to reflect the serious nature of the offence and to serve as a deterrent to potential offenders.

Fourthly, she concluded generally as follows:

> Given the circumstances of this case, the mitigating factors and the constraints imposed by the law on the court's discretion, I am of the view that the sentence on the first charge was appropriate and would serve public interest by giving the accused a chance to turn to honest living. I concede that in the totality of the circumstances before the court, I should have considered a term of imprisonment on the second charge.

Now, the principles which an appellate court must observe in an appeal against sentence are these:

(1) the court does not alter a sentence which is the subject of an appeal merely because the members of the court might have passed a different sentence. The trial judge had seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that the court will alter it;

(2) the first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to punish the offender but also to deter others. Public interest is best served if the offender is induced to turn from criminal ways to honest living. The law does not, therefore, fix the sentence for a

particular crime but fixes a maximum sentence and leaves it to the court to decide what is the appropriate sentence in the particular circumstances of each case. It is for these reasons that evidence of antecedents and character should be taken before sentence in respect of each convicted person.

(See *R* v *Ball*[1] followed in *Abu Bakar bin Alif* v *R*[2])

I have accordingly kept in the forefront of my mind the above principles in considering the issues which arise on this appeal.

Before me, counsel for the respondent put in a further report from Dr Verghese Thomas, dated 3 February 1988 wherein the latter stated, inter alia, that the respondent had seen him on no less than 20 occasions to receive psychotherapy and conselling. The doctor goes on to state that the respondent's physical health has improved and that he is well settled and psychologically well adjusted. The doctor concludes that custodial sentence would set the respondent back considerably and probably shatter any therapeutic gains he has made.

Clearly, the learned president in considering what sentence should be passed in respect of the first charge endeavoured to take into account not only the interests of the respondent but also that of the public. What appeared to have tilted the scales in favour of the respondent and induced her to deal with the case under s 294 of the Criminal Procedure Code was the unchallenged and uncontradicted medical report of Dr Verghese wherein he recommended categorically that for health reasons the respondent be spared corporal punishment. She reasoned that however short a prison sentence was imposed in respect of this charge, the provisions of s 8 of the Firearms (Increased Penalties) Act 1971 would be activated making it mandatory to impose an order of whipping of not less than six strokes.

Next, the learned president recognized that it was a rarity for an accused to be bound over on such a charge and an equal rarity for him to plead guilty thereto without any time wasting. Faced with this dilemma, she took a merciful course and decided to make the order for binding over under s 294 in order to obviate the necessity for imposing a sentence of corporal punishment.

With respect, in my view the learned president was clearly in error. Once a conviction is recorded in respect of an offence under s 8 of the Firearms (Increased Penalties) Act 1971, the provisions of s 294 of the Criminal Procedure Code are overridden and the court must proceed to impose a sentence of imprisonment and whipping with not less than six strokes.

Having given anxious consideration to everything which has been urged upon me I am afraid the sentence imposed by the learned president in respect of the first charge cannot be justified either in law or on principle.

It is true that the consultant psychiatrist had in his report recommended that the respondent be spared corporal punishment for health reasons. However, his report was an unsworn statement which was not tested by cross-examination though admittedly the prosecution did not contest the contents thereof.

But s 290(1) of the Criminal Procedure Code requires that those who have to undergo whipping must first be examined by a medical officer who will have to certify that the offender is in a fit state of health to undergo such punishment before it is carried out. Accordingly, it will be for the medical officer concerned to examine the respondent in order to determine if he is fit enough to undergo the whipping. In considering this question, the medical officer will be provided with copies of Dr Thomas Verghese's reports which he will no doubt take into consideration in arriving at his own conclusion as to whether or not the respondent is fit enough to undergo corporal punishment.

I now turn to consider the appeal relating to the second charge.

The learned president herself had conceded that she had made the mistake of dealing with each charge in isolation and, in her anxiety to avoid having to make an order for whipping she failed to consider that a sentence of imprisonment may have been appropriate on the second charge in order to reflect the serious nature of the offence and to serve as a deterrent to potential offenders. And, in her concluding sentence she repeated the point when she said, 'I concede that in the totality of the circumstances before the court, I should have considered a term of imprisonment on the second charge.

The effect of this concession made by the learned president was that so far as the second charge was concerned, she had omitted to take into account the public interest. In these circumstances, there has been a misdirection by way of non-direction, sufficient in my view to vitiate the sentence of fine imposed.

In cases which involve the unlawful possession of firearms and ammunition, which incidentally have reached epidemic proportions in this state and are ever increasing, a prison sentence is virtually inevitable, save possibly in altogether exceptional and extreme circumstances. Accordingly, the fact that the accused may be a youth, a first offender and has pleaded guilty, whilst relevant in considering the sentence to be imposed, must perforce yield to the public interest in ensuring deterrance and prevention.

Accordingly, the appeal against sentence as regards the first charge is allowed. The order binding over the respondent under s 294 of the Criminal Procedure Code is quashed. Similarly, the appeal against sentence as regards the second charge is also allowed. The order imposing a fine (which if paid must be refunded) is quashed.

In all the circumstances, after having given anxious consideration to the age, character, antecedents and family background of the respondent and the circumstances of the case as a whole, in respect of the first charge, I substitute a sentence of 18 months' imprisonment with effect from today and impose the mandatory order of whipping with six strokes. In respect of the second charge, I substitute a sentence of 18 months' imprisonment. The sentences to run concurrently as the offences were, in my view, committed in the course of a single transaction.

Finally, having regard to my aforementioned observations I direct that a copy of this judgment and copies of Dr Verghese's reports as well as other reports he may wish to tender, be transmitted to the relevant prison authorities.

*Appeal allowed.*

Solicitors: *Prabha Xavier & Associates.*

Reported by *Ng Sheau Jiuan*

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## Guna Sittampalam & Anor v Aik Hua Properties Sdn Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO C1-31-260-86
GUNN CHIT TUAN J
24 FEBRUARY 1989

*Contract – Forfeitable deposit – Failure of plaintiffs to pay balance of purchase price under sale and purchase agreements – Whether earlier deposits paid by plaintiffs constituted earnest deposits and were thus forfeitable – Words of the agreements and the entire circumstances of case to be looked at*

*Contract – Loss suffered by defendant upon breach of purchase contract by plaintiffs – Burden of proof cast upon defendant to show loss – Whether defendant had discharged burden and was entitled to compensation – Contracts Act 1950, s 75*

*Civil Procedure – Award of interest – Court's power to award interest from date prior to date of judgment under s 11 of Civil Law Act 1956 – Whether present case a fit and proper case for court to do so – Termination of contract by defendant upon plaintiffs' failure to pay balance of purchase price – Plaintiffs claim entitlement to deposits paid earlier and interest from date of contract termination to date of realization – Whether payment of interest was part of 'debt or damages' under s 11 of Civil Law Act 1956 – Civil Law Act 1956, s 11*

*Words and Phrases – 'Any debt or damages' – Civil Law Act 1956, s 11*

By a written agreement of 31 March 1985, the first plaintiff agreed to purchase and the defendant agreed to sell 250,001 shares in a company for a sum of $700,000. By another written agreement of the same date, the second plaintiff also agreed to purchase and the defendant agreed to sell the balance of 250,001 shares in that company for a total price of $700,000. The sole asset of the company was a piece of land in the city of Kuala Lumpur. The plaintiffs paid a deposit of $20,000 as earnest money on 18 February 1985 and also made the following payments to the defendant as part payment of the balance of the purchase price under the agreements: a sum of $110,000 on 30 March 1985, a sum of $10,000 on 15 April 1985 and a sum of $280,000 on 8 August 1985. Subsequently, the plaintiffs failed to pay the balance of the purchase price totalling $980,000 ($490,000 under each of the agreements) and the defendant terminated both agreements and purported to forfeit the sum of $420,000, being $210,000 under each agreement. The plaintiffs applied by originating summons for declarations that they were entitled to recover from the defendant the sum of $400,000 ($200,000 each plaintiff) paid by the plaintiffs under the two agreements. On the issue of interest, the plaintiffs contended that they were entitled to have their money back immediately upon the defendant terminating the contracts and interest at the rate of 8% pa from that date of termination to the date of realization. They argued that the award of interest from a date prior to the date of judgment was governed by s 11 of the Civil Law Act 1956.

In their defence, the defendant contended that a total sum of $140,000 paid under both agreements was forfeitable deposit and that the balance of $280,000 is fair compensation for the loss suffered by the defendant in consequence of the plaintiffs' failure to complete. Furthermore, interest should only commence from the date of the court order and that s 11 had no application to the instant case because that section referred specifically to proceedings for the recovery of any debt or damages and this was not such. In reply, the plaintiffs argued that the sum of $120,000 under cl 2(i) of both agreements was not forfeitable deposit or earnest money and this was agreed to by counsel on both sides in the agreed statement of facts. As to the loss suffered, the plaintiffs submitted that the court had to consider whether the defendant had suffered a loss amounting to or in excess of the balance retained by it. Evidence of the value of the land was thus adduced by both parties before the court. The plaintiffs produced one valuation (through PW1) and the defendant two valuations (through DW1 and DW2).

**Held,** allowing the plaintiffs' application in part:

(1) The defendant should not be prejudiced just because of what was only an error on the part of its counsel in having orally consented to the agreed statement of facts which was filed by the plaintiffs' counsel but not signed by the defendant's counsel.

(2) The court should construe the agreements themselves and it was stated in cl 1 thereof that $10,000 was earnest deposit paid by each plaintiff. Clause 2(i) clearly stated that $60,000 was to be paid by each plaintiff 'as a deposit towards account of the purchase price'. Looking at the entire circumstances of this case, not only was the $20,000 paid on 18 February 1985 'earnest deposit' but also the $110,000 paid on 30 March 1985 and the $10,000 paid on 15 April 1985 were true deposits.

(3) Where money is deposited with either contracting party on the formation of a contract, prima facie it will be interpreted as a security for performance and hence be forfeited if the depositor, in breach of the contract, fails to perform his side of the bargain.

(4) The plaintiffs were thus each only entitled to recover the sum of $140,000 from the defendant and the defendant was ordered to return to the plaintiffs a sum of $280,000.